In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of: CONCRETE PRODUCTS, INC. (Chapter 11 Case 88-20240) *Debtor* CONCRETE PRODUCTS, INC. *Plaintiff* v. ROOF DECKS, INC. *Defendant*	)	Adversary Proceeding Number 92-2100

FILED
at 9 O'clock & 48 min A M
Date 6-8-94
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

Debtor, Concrete Products, Inc., initiated this proceeding on December 16, 1992, seeking a judgment from this court declaring that any claim of Defendant, Roof Decks, Inc., arising from its counterclaim in a related adversary proceeding, now pending in the United States District Court for the Western District of North Carolina, to be a general unsecured claim. This matter was tried on May 10, 1994, in Brunswick, Georgia. Based upon the evidence adduced at trial, the record in the file and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code on October 3, 1988, and continued to operate its business thereafter as a debtor in possession under section 1107 of the Code. On May 5, 1989, James D. Walker, Jr. was appointed as a Chapter 11 Trustee, and on January 18, 1990, he commenced an adversary proceeding against Roof Decks, Inc. ("Roof Decks"), styled James D. Walker, Jr. v. Roof Decks, Inc. (Matter of Concrete Products, Inc.), Adv. Pro. No. 90-2003, Ch. 11 No. 88-20540, which sought recovery of $133,850.01 allegedly due Debtor for goods shipped to Roof Decks post-petition. Roof Decks counterclaimed in the amount of $184,246.55 for damages allegedly caused by the very same goods for which Debtor sought payment. Because Roof Decks is a North Carolina Corporation and because Debtor's claim arose after the commencement of its Chapter 11 case, the adversary was, pursuant to 28 U.S.C. § 1409, transferred to the United States District Court for the Western District of North Carolina, where it still pends. *See* James D. Walker, Jr., Chapter 11 Trustee v. Roof Decks, Inc. (Matter of Concrete Products,

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Inc.), Adv. Pro. No. 90-2003, Ch. 11 No. 88-20540 slip op. (Bankr. S.D.Ga. July 6, 1990).

The Trustee initiated another related adversary against Debtor's general liability insurer, The Home Insurance Company, seeking a declaratory judgment that The Home Insurance Company was obligated under Debtor's insurance policy to provide a defense to Roof Decks' counterclaim in the action which now pends in North Carolina. By order dated August 11, 1993, I ruled that the bulk of Roof Decks' counterclaim was based upon "business risks" not covered by Debtor's general liability policy. As a result, there is a substantial question as to whether any defense to Roof Decks' counterclaim will be provided in the action pending in North Carolina. With this prospect in mind and anticipating an award of some amount in favor of Roof Decks in the North Carolina action, Debtor (Trustee having been excused) initiated the instant proceeding seeking a judgment declaring any such award a general unsecured claim in Debtor's Chapter 11 case.

Contractual Relationship

In the months preceding the filing of Debtor's Chapter 11 case, Debtor and Roof Decks entered into a series of contracts calling for Debtor to ship to Roof Decks $273,110.00 worth of its manufactured products for a school construction project in Burke County, North Carolina ("Liberty School Project"), and $116,821.80 worth of products for a project in Cleveland County, North Carolina ("Boiling Springs School Project"). See Exhibits D-3 and D-5. Roof Decks was acting as a subcontractor on both of these projects, supplying labor to install the product that Debtor was to supply under the contracts. No specific time of delivery was required by either contract, it being understood by the parties that delivery dates would be arranged at a later time.

In fact, Debtor made no deliveries under these contracts until after it had filed its Chapter 11 petition. (Exhibit D-10). Roof Decks was not listed in Debtor's original bankruptcy schedules, but it became aware of the fact that Debtor was operating under Chapter 11 in mid-December, 1988. As to the Liberty School Project, Debtor made its first delivery on or about November 5, 1988, and made its final delivery on that project on or about January 29, 1989. Debtor shipped a total of $64,416.65 worth of material to the Liberty School Project, and Roof Decks actually incorporated $37,452.80 of that material into the project. (Exhibit D-9). As to the Boiling Springs School Project, Debtor made its first delivery on or about October 18, 1988, and made its final delivery on February 21, 1989. In total, Debtor shipped material to the Boiling Springs School Project worth $26,749.72, and Roof Decks actually incorporated $22,106.88 of this material into the project. (Exhibit D-10).

The January 29, 1989 delivery on the Liberty School Project and the February 21, 1989 delivery on the Boiling Springs School Project were not intended to be the final deliveries under the terms of the contracts in place between Debtor and Roof Decks. There were, however, significant problems with the product Debtor was shipping, as well as with Roof Decks making timely payment for the products actually shipped. The parties stipulated that Debtor "failed to make deliveries when due, but promised to perform". (Stipulation ¶ 2). In addition to Debtor failing to timely ship on certain deliveries, the product actually delivered was not, in every instance, suitable for its intended use in the school buildings. Some of the material was returned or discarded because it would not fit properly, was not level when installed, or failed under load. As a result of one incident, a "stop-work" order was placed on Roof Decks until Debtor's product could be tested to insure its conformity with load specifications. Some of the materials on hand failed an initial test but "barely passed" after a second testing procedure was conducted.

The parties also stipulated to the fact that Roof Decks failed to pay for any of the materials it received from Debtor. (Stipulation ¶ 7).[1] There is some dispute

[1] Roof Decks tendered into evidence one of Debtor's invoices that partially contradicts this stipulation. The invoice is dated October 18, 1988, and shows that Debtor shipped goods worth $16,543.80 to the Boiling Springs School Project on that same date. More importantly, the following hand-written notation appears at the bottom of the invoice: "Pd 1-20-89 Ck. # 4790". Roof Decks did not, however, tender any other evidence, such as the cancelled check, a bank statement, or even an explanation as to who made the notation on the invoice,

as to what the precise payment terms were under the contracts. The President of Roof Decks, Clyde Osborne, testified that the parties had an understanding that payment would not be made until Roof Decks was paid by the general contractor on a particular project. However, Mr. Osborne had no other evidence to support his testimony, and all of the invoices that Debtor sent to Roof Decks uniformly require that payment be made within 30 days of shipment, with a 10% discount available if payment was received within 10 days of shipment. Moreover, a letter, dated February 28, 1989, written by the CEO of Debtor and addressed to Mr. Osborne, was introduced into evidence. The relevant portion of the text of the letter provides as follows:

> As discussed by phone today, [Debtor] has been in a curtailed operations mode at our Brunswick plant for the past two weeks as dictated by our new board of directors. We anticipate resumption of manufacturing in another two weeks which would mean we would have product to ship in four weeks. This plan is predicated upon the receipt of accounts receivable sufficient to fund this action.
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> Since your firm is our major outstanding account of approximately $126,000.00 some dating back at least ninety days, we are looking to you and your firm to pay

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to prove that such a payment was in fact made for post-petition shipments. Furthermore, the customer number on this invoice is "960", while the customer number appearing on all of Debtor's other invoices to Roof Decks is "7775". Finally, this invoice is part of Defendant's Exhibit 9, which is supposed to contain materials relating only to the Liberty School Project. Given these inconsistencies and lack of specific proof, I decline to alter the parties' pre-trial stipulation as to this matter.

> what is due. *Without these funds we are dead in the water and will be unable to resume manufacturing of product to meet our commitment to your projects and other customers.*
>
> Send the money, you owe it and we need it.

(Exhibit D-20) (emphasis added). After weighing all the evidence, I find that Roof Decks was contractually obligated to remit payment under the terms specified in Debtor's invoices.

Prompted by these problems and the fact that Debtor was operating under Chapter 11, Roof Decks filed, on March 3, 1989, an Emergency Motion seeking *inter alia* an order compelling Debtor to immediately assume or reject the executory contracts relating to the Liberty and Boiling Springs School Projects. (Docket entry #26, ¶7). The motion was heard on April 13, 1989, and this court ruled that Debtor would be allowed five days to file its motion to assume or reject. On April 21, 1989, an order was entered, which provided in part as follows:

> ORDERED that Debtor shall file its motion to assume the executory contracts, as set forth and defined in the motion, within five days after April 20, 1989, if Debtor wishes to assume such executory contracts; and it is further

> ORDERED that in the event the Debtor fails to timely file its motion to assume the executory contracts as stated above, the executory contracts shall automatically be deemed rejected by Debtor which rejection is hereby approved by this Court; and it is further
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> ORDERED that if Debtor files a motion to assume the executory contracts, a hearing will be held on notice to movant on whether the assumption will be allowed or approved.

(Docket Entry #51). Debtor failed to file any such motion within the time allowed, and the parties stipulate that the contracts were therefore rejected on April 25, 1989. (Stipulation ¶3).

As a result of the various defects in Debtor's product, and after the contract was rejected, Roof Decks obtained another supplier and completed the job with cost overruns of $143,487.89. Furthermore, as a result of delays occasioned by the Debtor's delivery schedule and/or product defects, the owner or primary contractor refused to pay all of Roof Decks' contract, which led to an arbitration proceeding. Roof Decks ultimately was paid for its work, but incurred legal costs and expenses, including expert witness fees of $187,740.03, to vindicate its position.

As previously set forth, Debtor brought this action seeking a declaratory judgment that any debt which it might ultimately be held to owe Roof Decks shall be treated as a general unsecured claim in its Chapter 11 case. Roof Decks, on the other hand, asks this Court to declare any claim it may have as a result of the pending litigation in North Carolina to be entitled to administrative expense priority. Because of the amount of administrative claims in this case, which must be paid ahead of unsecured claims, and because of the magnitude of unsecured claims, the determination of the status of Roof Decks claim will, as a practical matter, also determine whether it will receive payment of virtually all, or virtually none of whatever claim it is ultimately allowed in this case.

CONCLUSIONS OF LAW

Section 365(a) of the Bankruptcy Code empowers a trustee or Chapter 11 debtor to assume or reject a contract that remains executory at the time of bankruptcy. See 11 U.S.C. § 365(a). The power to assume or reject such a contract, however, is subject to court approval. Id.; F.R.Bankr.P. 6006(c). Section 365(d)(2) of the Code permits a Chapter 11 debtor to assume or reject an executory contract "at any time before the confirmation of a plan," unless the court orders such decision within a specified time. See 11 U.S.C. § 365(d)(2). If an executory contract has not been previously assumed, the rejection of the contract constitutes a breach which is deemed to have occurred immediately preceding the date upon which a debtor has filed for bankruptcy. See 11 U.S.C. 365(g). Moreover, the other party to the rejected contract is given only a pre-petition, non-administrative claim against the bankruptcy estate. See 11 U.S.C. 502(g); In re Airlift Intern., Inc., 761 F.2d 1503, 1509 (11th Cir. 1985); In re Drexel Burnham Lambert Group, Inc., 134 B.R. 482, 487 (Bankr. S.D.N.Y. 1991). In contrast, if rejection occurs after a debtor has properly assumed a contract, then the other party to the contract is given a first-priority administrative claim against the estate. In re Airlift Intern., Inc., 761 F.2d at 1509; Matter of Huey's, Inc., Ch. 11 Case No. 91-41391, slip op. at 6-7 (Bankr. S.D.Ga. August 11, 1992).

The reasons for this statutory treatment of executory contracts are self-evident. The contract may be onerous or beneficial to the debtor, and the legal and financial consequences of a contract's assumption or rejection may have a tremendous bearing on the success of debtor's case. *See generally* Matter of Huey's, *supra* at 4. Because not only the immediate parties to the contract, but any number of creditors may have an interest in a debtor's decision to reject or assume a particular contract, the Debtor cannot, without obtaining court approval, exercise this very powerful right.

The evidence in this case established that Debtor and Roof Decks entered into the two contracts in question prior to Debtor's Chapter 11 bankruptcy.

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And, because no shipments had been made under either contract, both contracts were clearly "executory" on the date that Debtor filed its petition under Chapter 11. Therefore, Debtor's rejection of these unassumed contracts on April 25, 1989, after notice, a hearing and a court order, constituted what is deemed under the Bankruptcy Code to be a pre-petition breach of the contracts, and any claim which Roof Decks may have based upon damages arising therefrom is a general unsecured claim.

Roof Decks seeks to avoid this result by asserting that its damages should be accorded administrative expense treatment under section 503(b)(1)(A) of the Code because most of its damages stem from Debtor's breaches during the "gap period" between the filing of Debtor's bankruptcy petition on October 3, 1988, and Debtor's rejection of the contracts on April 25, 1989. Roof Decks makes two basic contentions in this regard. The first is that the damages which it sustained are properly characterized as actual, necessary costs and expenses of preserving the estate because the Debtor benefitted by having someone to sell, or at least ship, its goods to. The second contention is that, even if its damages did not bestow a benefit upon Debtor's estate, the damages should nevertheless be characterized as actual and necessary to preserving the estate under the Supreme Court's decisions in Reading v. Brown, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968), as well as the Eleventh Circuit Court of Appeals' decision in In re N.P. Mining Co., Inc., 963 F.2d 1449 (11th

Cir. 1992). For the reasons that follow, I reject both of these contentions.

> 11 U.S.C. Section 503(b)(1)(A) provides:
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--
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> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

11 U.S.C. §503(b)(1)(A). Roof Decks' claim does not involve the wages, salaries or commissions of Debtor's employees, and as a result, its claim is entitled to administrative priority only if it is construed to be an "actual, necessary cost and expense of preserving the estate." "The phrase 'actual, necessary' has been interpreted to mean those expenditures of the trustee for the cost of operating a business, for taxes and other costs incidental to the protection and conservation of the estate." Drexel Burnham, 134 B.R. at 487 (*quoting* In re Gamma Fishing Co., Inc., 70 B.R. 949, 953 (Bankr. S.D.Cal. 1987)). Moreover, as a general rule, only those expenditures that offer a clear benefit to the estate should be afforded administrative expense status, *see* Drexel Burnham Lambert Group, Inc., 134 B.R. 482 (*citing* Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 101 (2d Cir. 1986)), and the terms "actual"

and "necessary" should be strictly construed to keep "administrative expenses at a minimum so as to preserve the estate for the benefit of all its creditors." Otte v. United States, 419 U.S. 43, 53, 95 S.Ct. 247, 254, 42 L.Ed.2d 212 (1974). Finally, the claimant must prove by a preponderance of the evidence that it is entitled to administrative expense status. Burnham Lambert, 134 B.R. at 489.

With these principles in mind, I first note that the very term "costs and expenses" connotes items which accrue in the same manner as ordinary business expenses. Indeed, the Code lists wages, salaries or commissions for services rendered as examples of the type of costs and expenses which are contemplated. Admittedly, the list is non-exclusive, but unspecified other expenses would clearly encompass rent, utilities, insurance, regular payment to trade creditors and other ordinary deductible business expenses.[2] The damages which Roof Decks claims to have suffered as a result of Debtor's poor work product and untimely deliveries do not fit within this category of expenses.

Moreover, the Eleventh Circuit has made clear that "there must be an actual, concrete benefit to the estate" before a claim, that is based upon a trustee's use of the subject matter of an executory contract during the "gap period," is entitled to

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[2] *See generally* Norton Bankruptcy Law and Practice 2d §§ 42:16-42:20 (January, 1994).

administrative status. <u>In re Subscription Television of Greater Atlanta</u>, 789 F.2d 1530, 1532 (11th Cir. 1986). In that case, a Chapter 7 trustee made use of a television signal for seventeen days before terminating the operation of the debtor's business. The debtor was entitled to use the signal by virtue of an executory contract between it and the provider of the signal which obligated the provider to make the signal available to the debtor. After the trustee ceased using the signal, the provider requested that the trustee reject or assume the contract, but the trustee took no action, instead allowing the contract to be automatically rejected after sixty days pursuant to section 365(d)(1) of the Bankruptcy Code. Thus, the trustee actually utilized the subject matter of the contract for seventeen days, but retained the right to use it for sixty days.

The signal provider sought an administrative claim for the contract payments accruing for the entire sixty days that the trustee retained the right to use the signal. The Eleventh Circuit concluded that the provider was entitled to an administrative claim only for the seventeen days that the trustee actually used the signal, reasoning as follows:

> That which is actually utilized by a trustee in the operation of a debtor's business is a necessary cost and expense of preserving the estate and should be accorded the priority of an administrative expense. That which is thought to have some potential benefit,

> in that it makes a business more likely salable, may be a benefit but is too speculative to be allowed as an "actual, necessary cost and expense of preserving the estate."

Id.[3]

In this case, it is extremely difficult to discern how Roof Decks' accepting shipment of Debtor's goods, and then refusing to make payment for them, benefited Debtor's Chapter 11 estate. As the letter from Debtor's CEO to the President of Roof Decks, the text of which is set out above, reveals, what Debtor desperately needed was cash flow, the kind of cash flow that would have resulted from Roof Decks paying for the goods it received according to the contracts. In fact, Debtor's performance under these contracts during the gap period served only to worsen Debtor's financial condition because Debtor incurred all of the expenses required to produce the products shipped to Roof Decks without being compensated for these expenditures.

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[3] *See also* In re White Motor Corp., 831 F.2d 106, 110 (6th Cir. 1987) ("A creditor provides consideration to the bankrupt estate only when the debtor-in-possession induces the creditor's performance and performance is then rendered to the estate. If the inducement came from a pre-petition debtor, then consideration was given to that entity rather than to the debtor-in-possession. However, if the inducement came from the debtor-in-possession, then the claims of the creditor are given priority."); In re Cardinal Industries, Inc., 142 B.R. 801, 806-07 (Bankr. S.D.Ohio 1992) (Damages incurred by creditor as a result of Chapter 11 debtor's post-petition breach of construction contract not entitled to administrative expense priority, even where debtor's estate benefitted from breach, because estate had not assumed contracts and creditor did not prove that it had been induced post-petition to undertake any obligations not already set forth in the original pre-petition contract).

Had the roles been reversed, however, such that Roof Decks, a debtor in bankruptcy, received payment from the general contractor for work performed, yet failed to pay Concrete Products, Inc., a materialman, then Concrete Products' claim for post-petition deliveries would likely be entitled to administrative expense because actual benefit to the estate would be clear. Nor would it require much of a stretch to find in this case that, had Roof Decks paid in full for goods delivered which were later found to be defective, that its damages, up to the extent of payment, would be entitled to administrative expense priority. Again, an actual, concrete benefit to the estate is clear in such an instance.

This is not to say that Roof Decks acted improperly in withholding payment for the materials.[4] Roof Decks may have been within its rights in withholding payment for these goods, but in doing so, it clearly deprived Debtor of deriving any actual benefit from its performance under the contracts.

Accordingly, I find Roof Decks' argument that Debtor's continued performance under the contracts benefitted the Debtor because it enhanced Debtor's possibilities for successful reorganization, unpersuasive. While having these contracts

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[4] *See* In re Lease Purchase Corp., Ch. 7 Case 87-11177, slip op. at 5-6 (Bankr. S.D.Ga. September 29, 1993) (Dalis, B.J.) ("A recoupment is not subject to the automatic stay of Section 362.").

with Roof Decks may have, in some way, made Debtor a more valuable enterprise, the damages claimed by Roof Decks clearly did not bestow an actual, concrete benefit upon Debtor's estate.[5]

Roof Decks' second contention anticipates this conclusion. Citing In re N.P. Mining Co., Inc., 963 F.2d 1449 (11th Cir. 1992) and Reading v. Brown, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1986), Roof Decks argues that it is not required to prove an actual, concrete benefit to the estate to show that its damages were a necessary cost and expense of preserving Debtor's estate.

In Reading, a receiver was managing a building under Chapter XI of the former Bankruptcy Act when the building was completely destroyed by fire. The parties stipulated that the fire was the fault of the receiver, and approximately 147 claims, based upon damages suffered in the fire, were filed in the arrangement. These claims totalled in excess of $3,500,000.00, and as a result, the owner of the building

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[5] This conclusion is completely consistent with the Sixth Circuit's decision in In re United Trucking Service, Inc., 851 F.2d 159 (6th Cir. 1988), which Roof Decks cites in support of its position. In United Trucking, the debtor breached a pre-petition lease/contract by failing to make post-petition repairs to trailers that were the subject of the lease. In according the lessor administrative priority for claims based upon damages to the trailers, the court held that "the damages under the breached lease covenant, to the extent that they occurred post-petition, provided benefits to the bankrupt estate . . . " Id. at 162. In reaching this conclusion, the court specifically found that the debtor's failure to maintain and repair the trailers benefitted the debtor by allowing it to use the money saved to continue its operations. Id. Thus, the debtor in United Trucking received an actual, concrete benefit under the pre-petition contract not enjoyed by debtor in the instant case.

was subsequently adjudicated a bankrupt. The 147 claims thus became claims for administration under section 64(a)(1) of the Bankruptcy Act.

The Supreme Court held that, under section 64(a)(1) of the Bankruptcy Act, "damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to "actual and necessary costs" of a Chapter IX arrangement." Reading v. Brown, 391 U.S. at 485, 88 S.Ct. at 1767. In reaching this holding, the Court reasoned as follows:

> [I]t would be inconsistent both with the principle of respondeat superior and with the rule of fairness in bankruptcy to seek these objectives at the cost of excluding tort creditors of the arrangement from its assets, or totally subordinating the claims of those on whom the arrangement is imposed (i.e., tort victims) to the claims of those for whose benefit it is instituted (i.e., creditors of estate).

Reading v. Brown, 391 U.S. at 479, 88 S.Ct. at 1764.

In N.P.Mining, the Eleventh Circuit, relying in part upon the Supreme Court's reasoning in Reading v. Brown, held that "punitive civil penalties assessed as a consequence of the operation of a bankruptcy estate's business are 'actual, necessary costs and expenses of preserving the estate' under section 503(b)(1)(A)." N.P. Mining, 963 F.2d at 1459. The Eleventh Circuit also relied heavily upon 28 U.S.C. Section 959 which, in relevant part, provides:

> (b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. §959(b). Based upon this provision, the court concluded:

> The Alabama SMCRA requires that operators avoid violating specified environmental rules, abate violations when they do occur, and pay these fines for noncompliance. Because an operator outside the protection of the bankruptcy laws would be bound to pay these fines, the policy of section 959(b) that state law govern the actions of a trustee mandates that these fines be paid . . .
>
> We find that a policy of ensuring compliance by trustees with state law is sufficient justification to place civil penalties assessed for post-petition mining operations in the category of the "some cases" in which "costs ordinarily incident to operation of a business," Reading, 391 U.S. at 484, 88 S.Ct. at 1766, are

accorded administrative-expense priority.

N.P. Mining, 963 F.2d at 1458.

Perhaps the first thing to note about both Reading and N.P. Mining is that neither case involved the rejection or acceptance of a contract under section 365 of the Bankruptcy Code or similar provision under the Bankruptcy Act. Reading involved tortious conduct that inflicted damage upon parties who had no previous relationship with the debtor's estate, while N.P. Mining involved punitive civil fines assessed against an estate for environmental violations.

While not distinguishable merely because Roof Decks' claim arises out of contract rather than tort, to the extent that Reading's fairness test might control the outcome here, it is important to note that the victims of a tort injury are not in privity with the debtor in any way and have no ability to insulate themselves from the debtor tortfeasor. In contrast, a party to an executory contract is in privity with the debtor and is given tools with which to minimize its exposure. Specifically, a party in Roof Decks' shoes may force, as Roof Decks in fact did, a debtor to elect to assume or reject the contract early in the case. Moreover, it can only be forced to remain in a contract after notice and hearing, and then only if certain statutory criteria are met.

See 11 U.S.C. §§ 365(a) and (b). Because the Code contains a carefully constructed framework in Section 365 for dealing with breaches of executory contracts, and because neither the holding nor the rationale of Reading compel its application outside the tort context, I hold that it does not require that Roof Decks be allowed an administrative expense for any damages which it suffered as a result of Debtor's post-petition, but pre-rejection, breach of the contracts.

Likewise, N.P. Mining is distinguishable because it dealt with payment of a fine which was an express statutory duty imposed on the trustee, and it has no applicability to a claim seeking enforcement of a private contractual recovery. This conclusion is borne out by the fact that the Eleventh Circuit did not, in N.P. Mining, cite its previous decision in Subscription Television, presumably because the Court recognized that it involved the rejection of an executory contract and was not, therefore, relevant to the case before it. Thus, in allowing the fines as an administrative expense, the Eleventh Circuit merely recognized that environmental compliance is another ordinary cost of doing business, that a trustee is not excused by virtue of the bankruptcy from compliance, and the accrual of this liability is an actual and necessary prerequisite to keeping the doors of the debtor's business open under state law as made applicable to the trustee under Section 959.

In sum, a bankruptcy court must be very cautions in allowing a claim, which clearly does not bestow an actual, concrete benefit upon the estate, as an administrative expense. Undisciplined allowance of administrative expense priority claims must be disfavored as each such claim further subordinates or reduces every unsecured claim.[6] Accordingly, I conclude that both Reading and N.P. Mining should be limited to cases with similar fact patterns, and that Subscription Television is the controlling Eleventh Circuit authority when dealing with a pre-petition contract that is ultimately rejected. Applying the standard set forth in Subscription Television, I find that Roof Decks has not sustained its burden of proving that any damages that it may have suffered as a consequence of Debtor's breach of these pre-petition contracts should be accorded administrative expense status in Debtor's Chapter 11 case. The contracts in question arose pre-petition, Debtor properly rejected the contracts under section 365(g) of the Code, Roof Decks was not induced post-petition to undertake any obligation that it was not already obligated to do under the contracts, and its acceptance of the goods that Debtor shipped pursuant to the contracts during the gap period did not bestow an actual, concrete benefit upon Debtor because it refused to pay for the goods.

[6] *See e.g.*, In re Colortex Industries, Inc. 19 F.3d 1371, 1377 (11th Cir. 1994) (noting that expansive judicial construction of section 503(b)(1)(A) must be limited by countervailing doctrine that administrative expense priorities should be narrowly construed in order to maximize value of estate preserved for the benefit of all creditors).

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<u>ORDER</u>

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the claim of Roof Decks, Inc. is not entitled to administrative expense priority in Debtor's Chapter 11 case, but shall be allowed, subject to further objection, as a general unsecured claim.

Lamar W. Davis, Jr.
Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 7th day of June, 1994.